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No. 99-818

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1999

THE GOVERNMENT OF GUAM, ex rel.
THE GUAM ECONOMIC DEVELOPMENT AUTHORITY,
Petitioner,
v.
THE UNITED STATES OF AMERICA, THE DEPARTMENT OF DEFENSE, THE DEPARTMENT OF THE NAVY, THE DEPARTMENT OF THE AIR FORCE, THE DEPARTMENT OF THE INTERIOR, THE UNITED STATES FISH AND WILDLIFE SERVICE, and THE GENERAL SERVICES ADMINISTRATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 28(b) of the Guam Organic Act of August 1, 1950, requires the transfer of control to the Government of Guam of uplands, and tidelands, presently held by the United States but no longer needed for military purposes.

2. Whether, assuming Guam prevails on the First Claim of the Amended Complaint, Section 1(a) of the Territorial Submerged Lands Act of October 5, 1974, requires the transfer of title to the adjacent submerged lands to Guam.

3. Whether, alternatively, assuming unextinguished aboriginal title still attaches to the sum of these lands, control and possession of them must now be transferred to Guam.

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REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

The brief for the United States in opposition to Guam's petition attains its terseness by quiet avoidance. This reply brief addresses some of the matters the Government avoids.

Section 28(a) of the Organic Act of Guam of August 1, 1950 mandates a transfer to the new civilian government of Guam title to all United States property on Guam used in "civil affairs" (roads, hospitals, and so forth). Subsection (b) provides that all

other property owned by the United States in Guam, "not reserved by the President of the United States within ninety days after the date of enactment of this Act, is hereby placed under the control of the government of Guam . . . ."

Subsection (b) goes on at length: The property so transferred to the new government of Guam is "to be administered for the benefit of the people of Guam, and the legislature shall have authority, subject to such limitations as may be imposed upon its acts by this Act or subsequent Act of the Congress, to legislate with respect to such property, real and personal, in such manner as it may deem desirable." Fully 55 words are used to define the authority of the new Guam Legislature in its administration of the lands to be transferred to it. (These lands, of course, as we relate in our Petition, had always been the property either of individual Guamanians, or, by aboriginal right, of the Guamanian people as a whole, until they were confiscated by Spain or the United States.)

Little more than a thousand acres passed to Guam under subsection (a), as the court of appeals noted. *See* Petition 4a. But no lands whatever passed to Guam under subsection (b). For on the 90th day following enactment of the Organic Act, President Truman reserved 42,000 acres of land on Guam, which "appears to have included most, and perhaps all, of the land then owned by the United States in Guam." U.S. Opp. Br. at 3. They did.

Like the court below, the Government has said repeatedly that it reads Section 28(b) to mean that, when the President reserved all federally owned land on Guam on October 30, 1950, the force of that provision was fully spent. *See, e.g.*, U.S. Opp. Br. at 5. As a statement of its position, that is a thunderous understatement. Coyness aside, the United States reads Section 28(b) as never having had any force—as having had no force in 1950, and as having no force now. For the provision was, in terms, written to effect a *transfer* of lands, and yet no land was or is, in the view of the United States, ever to be transferred to Guam under that subsection. To contend, as the United States has, that Section 28(b) was in fact written to effect a *reservation* (not a *transfer)* of lands, trenches on the fanciful. *See, e.g.*, No. 97-17140, C.A. 9, *Brief for the Federal Appellees*, at 17, 20. Under the Property Clause, mere unalloyed silence on the part of Congress would have reserved all federally owned land on Guam to the United States.[1]

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[1] *See* U.S. Const. article IV, § 3, cl. 2; *see also* 2 Shalowitz, *Shore and Sea Boundaries* 443 (1964). For that matter, the President's power to create military

The intention imputed to 28(b) by the Government, then, would have required no word from Congress. And the altogether apparent intention of the section—a transfer of lands to Guam—was not at all what 28(b) was about, according to the United States. Was Section 28(b) then, as the Government contends, a wholly empty provision? To ask the question invites construction. And any of this Court's pertinent canons of construction requires a reversal of the decision below.

ARGUMENT

1. The United States contends that the Ninth Circuit's decision in no way "conflicts with the Court's decision in *Cariño v. Insular Government of the Philippine Islands*, 212 U.S. 449 (1909)." U.S. Opp. Br. at 7. *Cariño* was the case of a Philippine native claiming aboriginal title against the United States. The United States claimed that it had reserved the disputed land under a provision of the Philippines Organic Act (Section 12) that is in all pertinent respects identical with Section 28(b) of the Guam Organic Act. *See* Pet. 11, n.10. Justice Holmes for a unanimous Court in *Cariño* found the statutory provision ambiguous, and stressed repeatedly that any doubt must be resolved in favor of the native claim—that "every presumption is and ought to be against the government in a case like the present." 212 U.S. at 460. The Court ruled in favor of the aboriginal claim.

Cariño, then, upheld a claim of aboriginal title to lands, claimed by the United States, in a former Spanish possession acquired by the Treaty of Paris. It found Section 12 of the Philippines Organic Act—the analogue of and model for Section 28(b) of the later Guam Organic Act—ambiguous and hence open to construction. And it applied the rule of construction favoring the native claim. *See* Pet. 10-14. In each of these respects, the decision of the court of appeals conflicts squarely with the decision in *Cariño*. To borrow Justice Holmes's words, this is "a case like the present."

Lost in the Government's arguments, in this Court and in the courts below, and lost in the decisions of the courts below, is the purpose of our acquisition of the Philippines and Guam. As this Court has observed with respect to the Philippines, that purpose "was to administer property

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reservations is expressly confirmed in another section of the Guam Organic Act. (Sec. 33, 48 U.S.C. 1421k). Thus, Section 28(b) makes no sense if read as a reservation provision. If it does not contemplate a transfer, the whole of the subsection is superfluous.

and rights 'for the benefit of the inhabitants thereof.'" *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 284-85 n.18 (1955) (quoting 32 Stat. 695). Only the same enlightened purpose could have underlaid our simultaneous acquisition of Guam.[2]

2. The Government mischaracterizes why Guam asserts Section 28(b) is "open to construction." It is not merely because Section 28(b) does not address the question of what is to become of land reserved for military purposes in 1950 and later found surplus to those needs. *See* U.S. Opp. Br. 9. It is the larger question, described above, as the United States well knows. Section 28(b) is open to construction because, if it were to mean what the United States says, it is a wholly pointless waste of Congressional verbage. Full of sound if not fury, it would signify nothing. Moreover the whole of Section 28 is fraught with ambiguities and perplexities. These we set out in our Petition at pages 14-19. Our submission is thus not nearly so narrow as the United States would have the Court think. Just as its counterpart provision in the Philippine Organic Act was found ambiguous and in need of construction, so also is Section 28(b) of the Guam Act. As we note in our Petition (19-21), the difficulties in the Guam Act disappear when we permit ourselves to consult a page of history, especially when informed by the canon of construction so emphatically invoked in *Cariño*.

3. The United States next asserts that the Government of Guam is not the proper party to pursue the aboriginal-title claims of the native people of Guam. The United States, needless to say, is hardly the proper party to pursue the land claims of the native Chamorros. And that is so for reasons more compelling than the ordinary conflict of interest. (In all such cases, whatever lands the natives lose become the property of the United States.) For here, the United States denies, in the most emphatic (not to mention pettifogging) way, the land claims of the native people of Guam. The United States is thus hardly the proper representative of the

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[2]The Court's quotation is a reference to Section 12 of the Philippines Organic Act, quoted in Pet. 12 n.12, which enjoins the territorial government, upon receiving federal lands, to administer them in the interest of the natives. *See Cariño*, 212 U.S. at 458-59. As already noted, the provision finds an exact parallel in Section 28(b) of the Guam Organic Act, which likewise directs that the land transferred to the local government shall be "administered for the benefit of the people of Guam." Neither the Government nor the courts below have suggested a reason why these virtually identical provisions, the second obviously taken from the first, should not have the same import in the Philippines and in Guam, neighboring islands acquired from Spain by the same Treaty of Paris.

native people in this case, and it doesn't pretend otherwise. But it doesn't tell us who is.

If the United States were at all solicitous of the rights of the native people of Guam, it could do better than merely deny the standing of their territorial Government to assert those rights. It could tell us who, in its view, is entitled to assert them. In the courts below the United States suggested that only tribal leaders could assert those rights. But there are no tribal chieftains on Guam, as the United States well knows; they were killed in genocidal warfare of years past. Rogers Decl. at 5-7; U.S. Navy, "Report on Guam, 1899-1950" (Dept. of the Navy, Chief of Naval Operations 1951) at 1-2 [Guam Exh. 28]. Perhaps the United States has abandoned now its claimed need for tribal units to assert native rights on Guam, as it has in the case of native Hawaiians in its powerful amicus brief in *Rice v. Cayetano*, No. 98-818.

Regardless, the decisions of this Court, which has historically considered as its particular province the final adjudication of claims of native rights, leave no question that the Government of Guam is here a proper plaintiff. As we wrote in our Petition (22-23), native claims have been presented in court by tribal chieftains, an Indian superintendent, a group acting for all the Indians within a State, the United States of course, and by a State through its Attorney General.[3] Nothing in these cases, nor in any cited by the Government, precludes suit by a territorial government where there is no other apparent proper suitor. It would be a perverse irony indeed if native Guamanians, entitled to "every presumption . . . in a case like the present," are to be denied relief because, their tribal chieftains having long ago been slaughtered, there is no one left alive who can now maintain the suit.

The United States asserts that "'[a] State does not have standing as *parens patriae* to bring an action against the Federal Government,'" quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982), which in turn cites to *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). The passage from *Snapp*, though, was dictum,

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[3] *See, Indians of California v. United States*, 98 Ct. Cl. 583 (1942), *cert. denied*, 319 U.S. 764 (1943); *Indians of California*, 102 Ct. Cl. 837 (1944). In this instance, to be sure, a special jurisdictional Act provided that the California Attorney General could present the claims to the Court of Claims. Act of May 18, 1928, ch. 624, 45 Stat. 602, 25 U.S.C. sec 654. But this appears to be no more than acquiescence in a decision taken at the State level that California would attempt to vindicate the aboriginal claim of all Indians within the State. *See* Cal. Stats. 1927, ch. 643, p. 1092.

because the Federal Government was not a party. Moreover, the notion enunciated in *Massachusetts v. Mellon* is not of constitutional dimension, *Maryland People's Counsel v. F.E.R.C.*, 760 F.2d 318, 321 (D.C.Cir. 1985), and is by no means absolute. "We need not go so far as to say that a state may never intervene by suit to protect its citizens" against the Federal Government. *Mellon*, 262 U.S. at 485; *see Massachusetts v. Baird*, 400 U.S. 886 (1970) (Douglas, J., dissenting). Thus California was permitted to bring suit to vindicate the aboriginal rights of native Californians in *Indians of California v. United States*, 98 Ct.Cl. 583 (1942), *cert. denied*, 319 U.S. 764 (1943); *Indians of California*, 102 Ct.Cl. 837 (1944). In those cases Congress, it is true, assented to a determination by California, through its Attorney General Earl Warren, to sue the United States as *parens patriae* on behalf of the natives. But the assent of Congress does not appear essential. Here, in any event, we have Congress's waiver of sovereign immunity in the Quiet Title Act, among the other statutes pursuant to which this case was brought. And in the Guam Organic Act Congress manifests its intent that the new government of Guam act as the conservator of the new land patrimony of the Territory. Section 28(b) requires that the lands transferred to Guam under the section (none were, of course) "be administered for the benefit of the people of Guam, and the legislature shall have authority, subject to such limitations as may be imposed upon its acts by this Act or subsequent Act of the Congress, to legislate with respect to such property, real and personal, in such manner as it may deem desirable." No charge is more fundamental to the role of one responsible for administering land for another as the charge of defending and perfecting the title to that land. Here the Guam Legislature, acting pursuant to the role given it by Congress in Section 28(b), authorized this litigation.[4] *See* Northwest Territory of Guam Act of May 30, 1995 Guam Pub. L. No. 23-24.

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[4] In any event, the better view is that while *Mellon* may prohibit a State from bringing a *parens patriae* action to declare a federal statute unconstitutional, it does not apply when, as here, the State is suing "to vindicate the congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement. That federal agency is not the only public body that may invoke judicial assistance . . . ." *Washington Utilities & Transp. Com'n v. F.C.C.*, 513 F.2d 1142, 1153 (9th Cir. 1975).

4. The potential relevance of *Rice v. Cayetano* is not so easily dismissed as the Government would have it. Throughout this case the Government has emphatically denied the applicability to the native people of Guam of the canon requiring, when possible, the construction in their favor of a statute affecting the rights of native people. The Government's denial has been all along grounded on the assertion that the native Guamanians have never been in a trust relationship with the United States. *See* No. 97-17140, C.A. 9, *Brief for Federal Appellees* at 27-28. In the district court, counsel for the United States had added that native Guamanians should be viewed in the same light as native Hawaiians, with whom, it was said, no such special relationship exists. *See Defendants' Memorandum in Opposition to Plaintiff's Cross-Motion for Summary Judgment and in Further Support of Defendants' Motion for Summary Judgment* at 11-12.

Today the United States has wholly changed position. In its eloquent *Brief for the United States as Amicus Curiae*, filed in No. 98-818, *Rice v. Cayetano*, the Solicitor General emphatically maintains that there does exist a special fiduciary relationship between the United States and native Hawaiians. Presumably, he takes the same view with respect to native Guamanians.

If so, then he presumably also agrees that the canon of construction so forcefully articulated by Justice Holmes in *Cariño* and in scores of other cases (*see* Pet. 15, n.16) applies equally to the native people of Guam as to the native people of the Lower 48 States, Alaska and, now, Hawaii. It would remain only to dispel the fiction that the Guam Organic Act's Section 28 is so plain in its meaning as not to require construction. As we state succinctly in point 2 above, we think we have done this. *See* Pet. 15-19.

CONCLUSION

When Congress enacted Guam's Organic Act, 90 percent of the island's population was native Chamorro according to the most recent census figures. *See* Census of Population: 1950, Vol. II, Part 54, Table 36 (1953). America's purpose in acquiring the Philippines and, presumably, Guam too, "was to administer property and rights 'for the benefit of the inhabitants thereof.'" *Tee-Hit-Ton Indians v. United States*, 348 U.S. at 284-85 n.18 (1955) (quoting 32 Stat. 695).

In *Shoshone Tribe v. United States*, 299 U.S. 476, 486 (1937), Justice Cardoza wrote for the Court, "The loyalty of the Shoshone tribe to the

people of the United States has been conspicuous and unfaltering. A fidelity at least as constant and inflexible was owing in return." Months before passage of the Guam Organic Act, a House committee considering the bill proclaimed in plain awe, "There are no more patriotic, loyal people under the American flag than the Guamanians . . . . Throughout the Japanese occupation Guamanians demonstrated their great loyalty and devotion to this country."[5] We submit a fidelity at least as constant is owed the Guamanians. The petition should be granted.

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[5]H.R. Report No. 1677, 81st Cong., 2d Sess (1950), p. 4, reprinted in No. 97-17140, C.A. 9, *Brief for the Federal Appellees*, A-1 at A-4.

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